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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Placer)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DOMENICK LACURT BRYANT,

Defendant and Appellant.

C078629

(Super. Ct. No. 62093490A)

Defendant Domenick Lacurt Bryant pleaded no contest to possession of precursors for manufacture of methamphetamine with intent to sell, conspiracy to commit that offense, and commercial burglary. He also admitted a prior strike conviction and three prior prison terms. The trial court originally sentenced defendant to 11 years 8 months in prison, but subsequently resentenced him to 10 years 4 months in prison.

In his appellant's opening brief, defendant argued he was entitled to an additional reduction of his sentence because one of his prior prison terms was for petty theft with a

prior, a conviction that has since been reduced to a misdemeanor. We affirmed the judgment in a 2017 unpublished opinion (*People v. Bryant* (May 5, 2017, C078629) [nonpub. opn.]), but the California Supreme Court granted review and deferred the matter pending disposition of a related issue in *People v. Valenzuela*, S232900, or pending further order of the court.

In July 2018, the Supreme Court issued a decision in *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), a case consolidated with *Valenzuela* and *In re Guioimar* (S238888), addressing the effect of Proposition 47 on felony-based enhancements. (*Buycks*, at p. 871.) The Supreme Court held that a successful Proposition 47 petitioner can challenge an enhancement based on a reduced felony in certain circumstances. (*Buycks*, at p. 879.) The Supreme Court transferred this matter back to this court with directions to vacate our opinion and reconsider the cause in light of *Buycks*. The parties have filed supplemental briefs.

Having considered *Buycks* and the additional arguments of the parties, we conclude defendant's prior prison term enhancement based on his 2006 conviction must be stricken. The People agree. But the appellate record does not provide us with sufficient information to determine whether defendant's prior prison term enhancements for his 1998 and 2002 convictions must also be stricken under the washout provision of section 667.5, subdivision (b). Accordingly, we will vacate defendant's sentence and remand the matter to the trial court for resentencing.

## BACKGROUND

We limit our recitation of the background to facts relevant to the issue on appeal. Defendant pleaded no contest to possession of precursors for manufacture of methamphetamine with intent to sell (Health & Saf. Code, § 11383.7, subd. (b)(1)),

conspiracy to commit that offense (Pen. Code, § 182, subd. (a)(1)),<sup>1</sup> and commercial burglary (§ 459). He also admitted a prior strike conviction and three prior prison terms. In accordance with the stipulated sentence, the trial court sentenced defendant to 11 years 8 months in prison. (*People v. Bryant* (Oct. 24, 2012, C068752) [nonpub. opn.].) Defendant's prior prison terms were for a 1998 robbery, a 2002 first degree burglary, and a 2006 petty theft with a prior.

Defendant filed multiple petitions under section 1170.18, subdivision (a), seeking to have his convictions redesignated as misdemeanors. In January 2015, the parties stipulated that defendant's felony conviction for second degree burglary should be redesignated as a misdemeanor. The trial court amended the convictions and resentenced defendant, subtracting 16 months from his sentence, reducing his aggregate prison term to 10 years 4 months. The trial court found the other convictions did not qualify for redesignation. Defendant filed a notice of appeal on February 19, 2015. In April 2015, in case No. 06F01050, the trial court granted defendant's petition to redesignate the petty theft with a prior conviction as a misdemeanor.

## DISCUSSION

### I

Defendant argues the reduction of his 2006 felony petty theft with a prior conviction to a misdemeanor entitles him to a further sentence reduction because that conviction was the basis for one of the prior prison term enhancements. The issue was not raised in the trial court. Defendant filed his notice of appeal before his petty theft conviction was reduced to a misdemeanor and the trial court was divested of jurisdiction. (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 920-930.) Because defendant asserts a question of law that may be resolved on undisputed facts, we will exercise our

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

discretion to resolve the appeal. (*People v. Tran* (2015) 61 Cal.4th 1160, 1166; *People v. Scott* (2012) 203 Cal.App.4th 1303, 1311; *People v. Rosas* (2010) 191 Cal.App.4th 107, 115.)

Proposition 47, the Safe Neighborhoods and Schools Act (the Act) requires “misdemeanors instead of felonies for nonserious, nonviolent crimes . . . unless the defendant has prior convictions for specified violent or serious crimes.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 70.) Among the affected crimes is petty theft with a prior, which is now a misdemeanor except in circumstances not relevant here. (See §§ 666, 490.) The prior prison term enhancement applies if a defendant is convicted of a felony and serves a prison term for that conviction. (§ 667.5, subd. (b).) Defendant argues a prior prison term enhancement based on what is now a misdemeanor conviction does not survive the Act.

In *Buycks, supra*, 5 Cal.5th 857, 879, the California Supreme Court concluded that “a successful Proposition 47 petitioner may subsequently challenge, under subdivision (k) of section 1170.18, any felony-based enhancement that is based on that previously designated felony, now reduced to misdemeanor, so long as the judgment containing the enhancement was not final when Proposition 47 took effect.” The court explained that “the resentencing of a prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year enhancement. A successful Proposition 47 petition or application can reach back and reduce a defendant's previous felony conviction to a misdemeanor conviction because the defendant ‘would have been guilty of a misdemeanor under’ the measure had it ‘been in effect at the time of the offense.’ (§ 1170.18, subds. (a), (f).) Therefore, if the ‘felony conviction that is recalled and resentenced . . . or designated as a misdemeanor’ conviction becomes ‘a misdemeanor for all purposes,’ then it can no longer be said that the defendant ‘was previously convicted of a felony’ [citations], which is a necessary element for imposing the section 667.5, subdivision (b) enhancement. Instead, ‘for all

purposes,’ it can only be said that the defendant was previously convicted of a misdemeanor. [¶] Consequently, section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under the measure.” (*Buycks*, at pp. 889-890, fn. omitted.) The Court explained that in applying section 1170.18, a trial court must “reevaluate the continued applicability of any enhancement based on a prior felony conviction.” (*Buycks*, at p. 894.)

We conclude that defendant’s prior prison term enhancement based on his 2006 conviction must be stricken. The People agree.

## II

Defendant further contends that because his enhancement based on the 2006 conviction must be stricken, his prior prison term enhancements for the 1998 and 2002 convictions must also be stricken under the washout provision of section 667.5, subdivision (b).

Section 667.5(b) provides for a one-year sentence enhancement on a new felony conviction resulting in a prison sentence when the defendant was previously convicted of a felony and served a prison term. “Under the washout provision, however, the enhancement is not imposed if the defendant is free of both felony convictions and incarceration in prison for five years following release from the previous incarceration. (§ 667.5, subd. (b).)” (*People v. Warren* (2018) 24 Cal.App.5th 899, 909, italics omitted.) Thus, “ ‘if a defendant is free from both prison custody and the commission of a new felony for any five-year period following discharge from custody or release on parole, the enhancement does not apply.’ ” (*Buycks, supra*, 5 Cal.5th at p. 889, italics omitted.)

The appellate record does not provide us with sufficient information to make this determination. “[W]hen part of a sentence is stricken on review, on remand for resentencing ‘a full resentencing as to all counts is appropriate, so the trial court can

exercise its sentencing discretion in light of the changed circumstances.’ [Citation.]”  
(*Buycks, supra*, 5 Cal.5th at p. 893.) This rule is applicable in the Proposition 47 context.  
(*Buycks*, at pp. 893-894.) Accordingly, on remand, defendant can contest the validity of  
the other prior prison enhancements pursuant to the washout rule and the People can  
present any evidence they may have that the washout provision does not impact the 1998  
and 2002 prior prison term enhancements.

#### DISPOSITION

Defendant’s sentence is vacated and the matter is remanded to the trial court for  
resentencing.

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/S/  
MAURO, J.

We concur:

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/S/  
BUTZ, Acting P. J.

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/S/  
HOCH, J.